UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

December 10, 1998

UNITED STATES OF AMERICA, Complainant	)	
v.	)	8 U.S.C. § 1324a Proceeding
	)	OCAHO Case No. 98A00084
UNION LAKEVILLE CORPORATION d/b/a SKYLINE DINER RESTAURANT, Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

On September 24, 1998, the Immigration and Naturalization Service (complainant or INS) filed a Motion for Summary Decision requesting that the alleged facts of violation in the Complaint at issue be resolved in complainant's favor.

As grounds therefore, INS correctly urges that on September 11, 1998 in having filed its letter pleading type Answer to the Complaint, Union Lakeville Corporation d/b/a Skyline Diner Restaurant (respondent or Union Lakeville) failed to expressly admit or deny each allegation of the Complaint, as required by the provisions of the pertinent procedural rule, 28 C.F.R. § 68.9(c)(1), and therefore all allegations in the Complaint shall be deemed to be admitted.

By way of background, on August 14, 1998, INS filed the three-count Complaint herein which alleges some 24 record keeping, or so-called paperwork, violations of the Immigration Reform and Control Act of 1986 (IRCA), as amended, 8 U.S.C. § 1324a, and seeks civil money penalties totalling $8,840 for those alleged infractions.

INS alleged in Count I that Union Lakeville violated section 1324a(a)(1)(B) by having failed to either prepare or make available for inspection Employment Eligibility Verification Forms (Forms I-9) for the 10 employees named therein. INS assessed civil money penalties of $360 for each of these alleged violations, or a total of $3,600.

In Count II, INS charged that respondent had also violated section 1324a(a)(1)(B) by having failed to ensure that the five named employees properly completed Section 1 of their Forms I-9 and by also having failed to properly complete Section 2 of those Forms I-9. Civil money penalties were assessed in the sum of $360 for each of four violations and $460 for the remaining infraction, or a total of $1,900 on that count.

INS alleged in Count III that Union Lakeville again violated section 1324a(a)(1)(B) by having failed to properly complete Section 2 of the Forms I-9 for each of the eight named employees and assessed $360 civil money penalties for each of seven of those infractions and $460 for the remaining violation, or a total of $2,980.

Standards of Decision

The procedural rules of this forum provide for motions for summary decision, 28 C.F.R. § 68.38. This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provide for the entry of summary judgment in federal court cases. Accordingly, case law interpreting Rule 56(c) is instructive in interpreting section 68.38 in proceedings before this Office. Alvarez v. Interstate Highway Constr., 3 OCAHO 430, at 405 (1992).[1]

A motion for summary decision is properly granted when an examination of "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed" indicate the absence of any genuine issue of material fact. 28 C.F.R. § 68.38(c). When, as here, the motion is based solely on the inadequacy of the pleadings, it is the equivalent of a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure. 10A Charles Alan Wright et al., Federal Practice and Procedure § 2722 (3d ed. 1998). Although the procedural rules of this Office do not contain a rule similar to Rule 12(c), some OCAHO decisions have recognized such a motion under the provisions of 28 C.F.R. § 68.1.[2] Such a distinction, however, is not necessary in this case since the standard for both motions is essentially the same namely, whether there is a genuine issue of material fact. United States v. Harran Transp. Co., 6 OCAHO 857, at 343 (1996); Wright, supra § 2713.

The purpose of summary decision is that of avoiding an unnecessary hearing when there is no genuine issue of material fact. Zip City Partner, 7 OCAHO 965, at 714. The Supreme Court has stated that an issue is material only if it affects the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party has the initial burden of showing the absence of any genuine issue of

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[1]Citations to the Office of the Chief Administrative Hearing Officer (OCAHO) precedents reprinted in bound Volumes 1 to 7, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1 to 7 are to the specific pages, seriatim, of the specific entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 7, however, are to pages within the original issuances.

[2] "The Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules . . . ." 28 C.F.R. § 68.1; see also United States v. Harran Transp. Co., 6 OCAHO 857, at 343 (1996).

material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); United States v. Lamont St. Grill, 3 OCAHO 441, at 480 (1992). The non-moving party must then produce specific material facts which are genuinely at issue. Anderson, 477 U.S. at 250; Fakunmoju v. Claims Admin. Corp., 4 OCAHO 624, at 315 (1994). All facts and reasonable inferences drawn therefrom should be viewed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

A motion for summary decision may be granted on the basis of facts deemed admitted. United States v. Anchor Seafood Distribs., Inc., 4 OCAHO 718, at 1123 (1994); United States v. Raygoza, 5 OCAHO 729, at 49 n.3 (1995). In filing responsive pleadings, the respondent must either admit, deny, or state that it has insufficient information to admit or deny each allegation in the complaint. "[A]ny allegation not expressly denied shall be deemed to be admitted . . . ." 28 C.F.R. § 68.9(c)(1).

Discussion

In support of its motion, INS urges that summary decision should be granted on all facts of violation alleged in the Complaint since Union Lakeville has failed to expressly deny any of those allegations, resulting in their being deemed to be admitted and therefore leaving no remaining genuine issues of material fact for adjudication.

The pleadings of a pro se party, as here, are to be held to a less stringent standard than those filed by a party represented by counsel. Haines v. Kerner, 404 U.S. 519, 520 (1972); Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983). The Court of Appeals for the Second Circuit has ruled that the right to self-representation implies an obligation by the court to make reasonable allowances to protect pro se litigants from inadvertently and unknowingly forfeiting important rights. Traguth, 710 F.2d at 95. It also held that "[w]hile the right 'does not exempt a party from compliance with relevant rules of procedural and substantive law,' it should not be impaired by harsh application of technical rules." Id. at 95 (citation omitted) (quoting Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981); see also Edwards v. INS, 59 F.3d 5, 8 (2d Cir. 1995) ("[P]ro se litigants generally are required to inform themselves regarding procedural rules and to comply with them.").

In the case at hand, Union Lakeville provided answers to each allegation by having filed a letter addressed to the undersigned. That correspondence was signed by the president of that corporation, William Psaros. Count I alleged that respondent failed either to prepare or to make available for inspection Forms I-9 for 10 employees in violation of section 1324a(a)(1)(B). In the Answer, Mr. Psaros stated that at the time the individual employees were hired he obtained copies of the necessary documents and stated, "I thought copies of the documents would satisfy the record keeping requirements. When I learned the I-9 must be completed, I promtly [sic] completed the I-9 for any employees still in my employ."

Count II alleged that respondent failed to ensure that the five named employees properly

completed Section 1 of their Forms I-9 and that respondent also failed to properly complete Section 2 of those same forms, all in violation of section 1324a(a)(1)(B). In the Answer, Mr. Psaros stated that "the employees listed in Paragraph A of Count II had not dated the form. I have since dated the form. In answer to part 'D,' I had not properly dated the form and did not include the document number . . . . I have since completed the document number."

Count III alleged that respondent failed to properly complete Section 2 of the Forms I-9 for eight employees in violation of section 1324a(a)(1)(B). Mr. Psaros responded in the Answer that "I failed to properly date the I-9 form. I have since dated the I-9 form in Section 2 . . . ."

In conclusion, Mr. Psaros stated,

> [t]his is my first encounter with a review of such records. Now that I am fully aware of the proper procedures, I am sure that a future review of I-9 forms would result in your determination of my full compliance. The fines proposed for these violations would create a hardship for my business . . . . I believe [sic] my records demonstrate compilance [sic] with the spirit of the law if not the technicality of the law. I do not think I should be penalized in this situation.

In its Answer, Union Lakeville failed to expressly deny any of the allegations and therefore essentially admitted the charges. While mindful of the respondent's pro se status, Mr. Psaros' statements obviously cannot be interpreted as denials, per se. He has in fact acknowledged the facts of violation but has chosen to dispute only the penalty sums assessed by INS. At the very least, the applicable procedural rule provides in clearly expressed wording that the failure to expressly deny an allegation will be deemed to be an admission. 28 C.F.R. § 68.9(c)(1). The second circuit in Traguth admonished courts not to penalize pro se parties by harshly applying technical rules but did not excuse pro se parties from complying with the procedural rules of the tribunal. In addition, the Supreme Court has stated "we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel." McNeil v. United States, 508 U.S. 106, 113 (1993).

Mr. Psaros' statements can most favorably be viewed as an attempt to explain that the violations resulted from respondent's ignorance of the law.[3] He has given his assurance that Union Lakeville will comply with IRCA's record keeping requirements in the future and he has also requested that the proposed civil money penalties sums be reduced. Based on the rulings of the second circuit and the Supreme Court, the plainly worded requirements of Rule 68.9(c)(1) cannot be ignored or waived simply because respondent is acting pro se. Instead, Union Lakeville's failure to deny any of the allegations in the Complaint in its Answer must be deemed to be an admission of all alleged facts of violation, leaving no genuine issue of material fact to be adjudicated.

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[3] Ignorance of IRCA's requirements is not an affirmative defense but is a mitigating factor in the assessment of the civil penalty. United States v. Davis Nursery, Inc., 4 OCAHO 694, at 933 (1994); see also Mester Mfg. Co. v. INS, 879 F.2d 561, 569 (9th Cir. 1989).

In view of the foregoing, INS' Motion for Summary Decision concerning all facts of violations pertaining to the 24 paperwork violations alleged in Counts I, II, and III is hereby granted.

Concerning the proposed civil money penalties herein, section 1324a(e)(5) provides that civil money penalties for paperwork violations range from a statutorily mandated minimum sum of $100 to a maximum levy of $1,000 for each individual employee with respect to whom a violation has occurred. In assessing each civil money penalty, that section of IRCA also provides that due consideration shall be given to: (1) the size of the business of the employer being charged, (2) the good faith of the employer, (3) the seriousness of the violation, (4) whether or not the individual was an unauthorized alien, and (5) the history of previous violations. 8 U.S.C. § 1324a(e)(5).

A telephonic prehearing conference will be conducted shortly for the purpose of scheduling a hearing in New York City on the earliest mutually convenient date for the sole purpose of determining the appropriate civil money penalties to be assessed for these 24 proven violations.

In lieu of a formal hearing, the parties may choose instead to submit written memoranda concerning the appropriate civil money penalty sums to be assessed for these proven violations, giving due consideration to the previously enumerated five statutory criteria.

Joseph E. McGuire
Administrative Law Judge